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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. ~~623. 624~~ 22-23 October Term, 1927.

CHARLES WARNER COMPANY,
Libellant and Appellee,
v.
INDEPENDENT PIER COMPANY,
Respondent and Appellant.

CHARLES WARNER COMPANY,
Libellant and Appellee,
v.
STEAMSHIP "GULFTRADE," Whereof GULF REFINING COMPANY is Claimant,
Appellant.

Petition for Writs of Certiorari.

ACKER, MANNING & BROWN,
Proctors for Petitioner.

J. T. MANNING, JR.,
EVERETT H. BROWN, JR.,
Of Counsel.

International, 236 Chestnut St., Philadelphia

IN THE

Supreme Court of the United States.

October Term, 1927. No.

In the Matter of the Petition of Charles Warner Company for a Writ of Certiorari Directed to the Circuit Court of Appeals of the United States for the Third Circuit to Bring Before the Supreme Court the Cases of:

CHARLES WARNER COMPANY,
Libellant and Appellee,

v.

INDEPENDENT PIER COMPANY,
Respondent and Appellant.

CHARLES WARNER COMPANY,
Libellant and Appellee,

v.

STEAMSHIP "GULFTRADE" WHEREOF GULF REFINING COMPANY IS CLAIMANT,
Appellant.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petition of Charles Warner Company for a writ of certiorari directed to the Circuit Court of Ap-

peals for the Third Circuit to bring before the Supreme Court the cases of Charles Warner Company v. Independent Pier Company and Charles Warner Company v. Steamship "Gulftrade" whereof Gulf Refining Company is claimant, respectfully shows to this Honorable Court as follows:

1. Your petitioner Charles Warner Company is a corporation of Delaware with its principal place of business in Philadelphia, Pennsylvania and was, at all times hereafter mentioned, the owner or charterer of certain lighters known as Nos. 18, 33 and 44, and the owner of the cargoes loaded thereon. The Independent Pier Company is a corporation of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania and was, at all times hereafter mentioned, the owner of the Steamtug "Triton." The Steamship "Gulftrade" is an American steamship at all times hereafter mentioned owned by Gulf Refining Company, a corporation of Texas with an office and place of business in Philadelphia, Pennsylvania.

2. This litigation involves a collision occurring on October 1, 1923, in the Schuylkill River between the aforesaid lighters Nos. 18, 33 and 44 in tow of the Steamtug "Taurus" also owned by your petitioner and an overtaking vessel, the Steamship "Gulftrade," whose navigation at the time was in charge of the master of the Steamtug "Triton," an employe of the Independent Pier Company.

3. At the time of the collision the "Taurus" and its tows constituted the *overtaken* vessel and the Steamship "Gulftrade" with its attendant tugs the "Triton" and the "F. A. Churchman" the *overtaking* vessel, the evidence showing that the "Gulftrade" followed the "Taurus" and tows up the Delaware

River; and then, after an exchange of one blast whistle signals, in attempting to pass the tow, ran it down causing serious damage and loss of the life of one of the lightermen.

4. A libel to recover for the loss arising out of the collision was filed on behalf of your petitioner in the United States District Court for the Eastern District of Pennsylvania against the Steamship "Gulftrade" in rem, her owner the Gulf Refining Company, Inc., in personam the attendant Steamtugs "Triton" and "F. A. Churchman" in rem and their owners Independent Pier Company and Alfred C. Churchman in personam; and, after hearing upon pleadings and proofs the said Court held the Steamship "Gulftrade" and those in charge of her navigation wholly at fault, and an interlocutory decree was entered on February 23, 1927, in favor of your petitioner against Independent Pier Company primarily and against the Steamship "Gulftrade" and its stipulator for value secondarily.

5. Appeals were taken from the said decree by both Independent Pier Company and the claimant of the Steamship "Gulftrade" to the Circuit Court of Appeals for the Third Circuit and after hearing of the two appeals together on June 7, 1927, the said Court filed its opinion, holding both the tug "Taurus" and the Steamship "Gulftrade" at fault for the collision and directing that the decree of the Court below be modified accordingly. The Circuit Court of Appeals based the fault of the tug "Taurus" upon the following finding:

> "When the whistle of the 'Gulftrade' blew the 'Taurus' certainly was not in a position to let the 'Gulftrade' pass in safety, but she, nevertheless, agreed that the 'Gulftrade' come ahead. La-

ter on the 'Gulftrade' evidently became anxious and blew another blast, to which the 'Taurus' gave the same consent to go ahead, and while there is some question as to whether the 'Gulftrade' blew a third blast and got the same consent, we are inclined to think she did. Now it seems to us that under the circumstances, the 'Taurus' was in fault, in giving these three consents to the 'Gulftrade' to come ahead, relying too much on her ability to get out of the channel."

6. A petition for reargument was filed on behalf of your petitioner in said Circuit Court of Appeals which petition was dismissed by that Court on August 19, 1927.

7. Your petitioner avers that the Circuit Court of Appeals, in holding that the assent by the "Taurus" to the passing signal of the "Gulftrade" was at fault, placed a burden on the overtaken vessel, the "Taurus" to do more than maintain her course and speed as required by law and put an obligation upon her to keep out of the way and to share with the overtaking vessel, the "Gulftrade" the risk and responsibility of a safe passage.

8. Your petitioner is informed and believes and, therefore, respectfully avers that the learned Circuit Court of Appeals was in error in holding as aforesaid; and that the assenting signals given by the "Taurus" in answer to the signals of the "Gulftrade" constituted nothing more than an expression of an understanding of what the "Gulftrade" proposed to do and an agreement on the part of the "Taurus" not to thwart it; and to maintain her course and speed; and that, under the law, the "Gulftrade" still remained the sole judge as to the matter of safety of the passage at the point selected; and that upon it was

the risk of the maneuver and the burden to keep out of the way.

9. Your petitioner is informed and believes and, therefore respectfully avers that the holding of the said Circuit Court of Appeals is in conflict with the holding of the Circuit Court of Appeals for the Eighth Circuit in the case of Atlas Transport Company v. Lee Line Steamers, 235 Fed. 492, in which case a petition for rehearing was refused by the said Court 238 Fed. 349 and a petition for certiorari was refused by your Honorable Court. Lee Line Steamers v. Atlas Transport Company, 243 U. S. 643. In that case the steamer "Rees Lee" in attempting to pass the steam tug "Josh Cook" with four barges in tow collided with her; and, in holding the "Rees Lee" solely at fault, the Circuit Court said, 235 Fed. 495:

> "Under these rules, the Josh Cook had the right and the duty to hold her course. It was not its duty to keep away from the Rees Lee, unless a collision should become imminent. The Rees Lee had the right to pass the other boat, if it could do so with safety to both. It had to be its own judge as to the matter of safety as whatever risk attended its passage from the narrowness of channel, the shallowness of water, the current, suction, or other causes, except the fault of the Josh Cook, was assumed by the Rees Lee. *The reply of the Josh Cook to the passing signal of the Rees Lee was no more than an assent to it, at the risk of the vessel proposing it. It expressed an understanding of what the Rees Lee proposed to do, and an agreement not to thwart it, but the success of the maneuver was at the risk of the Rees Lee.*" (Italics ours.)

10. The question of law involved in this case is substantially as follows:

I. Does the assent of an overtaken vessel to the passing signal of an overtaking vessel place a burden on the former to keep out of the way of the latter; and to share with her the responsibility of a safe passage; as decided by the Circuit Court of Appeals in the present case, or

II. Does it constitute no more than an assent to the passing at the risk of the overtaking vessel, which is to be her own judge of the matter of safety in passing and assumes all risks except such as may be the fault of the overtaken vessel in failure to maintain her course and speed as decided by the Circuit Court of Appeals for the Eighth Circuit in Atlas Transport v. Lee Line Steamers (vide *supra*).

10. Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

I. Because the question of law herein has not been passed upon by this Court.

II. Because the public interest and the interest of jurisprudence require a decision of this Court upon the questions of law involved herein.

III. Because the decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Atlas Transport Company v. Lee Line Steamers above referred to.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue directed to the

United States Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said Court in the above-entitled causes, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioner will ever pray.

CHARLES WARNER COMPANY,

By its Attorneys,
ACKER, MANNING & BROWN.

J. T. MANNING, JR.,
Proctor for the Petitioner.
EVERETT H. BROWN, JR.,
Of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

Reed C. Bye, being duly affirmed according to law, deposes and says that he is the vice-president of Charles Warner Company, the petitioner, and duly authorized to make this affidavit on its behalf, that he has read the foregoing petition; that the facts therein stated are true to the best of his knowledge, information and belief and that his knowledge is derived from the record in the case.

Affirmed and subscribed before me this
day of A. D.
1927.

REED C. BYE.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded, and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

.....
Proctor for the Petitioner.

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STEAMSHIP "GULFTRADE," Whereof GULF REFINING COMPANY is Claimant,
Appellant.

Brief in Support of Petition for Writs of Certiorari

ACKER, MANNING & BROWN,
Proctors for Petitioner.

J. T. MANNING, JR.,
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Of Counsel.

International, 236 Chestnut St., Philadelphia

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ADDENDA.

The decision of the District Court for the Eastern District of Pennsylvania, per Dickinson, *J.*, has not been reported.

The decision of the Circuit Court of Appeals for the Third Circuit, rendered June 7, 1927, is reported under the name of *Independent Pier Co. v. Charles Warner Co., Gulf Refining Co. v. Charles Warner Co., The "Gulftrade,"* 20 Fed. 2d, 111, and under the name of the *"Gulftrade,"* 1927 A. M. C. 1148.

The final decision of the Circuit Court of Appeals for the Third Circuit, in this case rendered August 19, 1927, upon the petition for rehearing filed by the petitioner herein, has not been reported.

IN THE

Supreme Court of the United States.

October Term, 1927. No. .

In the matter of the petition of Charles Warner Company for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States for the Third Circuit to bring before the Supreme Court the cases of:

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CHARLES WARNER COMPANY,
Libellant and Appellee,

v.

STEAMSHIP "GULFTRADE" WHEREOF GULF REFINING COMPANY is CLAIMANT,
Appellant.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE FACTS.

The facts in this case are as follows:

On October 1, 1923, the Steamtug "Taurus" having in tow the lighters Nos. 18, 33, 14 and 53, all of which vessels were owned or chartered by the peti-

tioner, was proceeding up the Delaware River bound for Bainbridge Street Wharves, Schuylkill River. The lighters were towed astern of the tug on a hawser, in two tiers, two abreast.

While the "Taurus" and tows were proceeding up the river the Steamship "Gulftrade" was picked up off Fort Mifflin by the steam tugs "Triton" and "F. A. Churchman." The master of the "Triton" assumed charge of the navigation of the flotilla and the "Gulftrade" under her own power followed the "Taurus" up the Delaware River.

The "Gulftrade" and her tugs proceeding at a greater rate of speed gradually overhauled the "Taurus" and her tows and several one blast passing signals were exchanged. The "Taurus" passed into and proceeded up the Schuylkill River and hauled to her port. About this time the "Gulftrade" which was coming into the Schuylkill River close astern of the tug and its tow was observed by those on the tug to be heading for the scows. The master of the "Taurus" at once blew danger signals but the "Gulftrade" continued on her course and in a moment it ran down the tow, capsizing one lighter and doing other damage. The lighterman on the capsized scow was drowned.

A libel was filed on behalf of the petitioner in the District Court for the Eastern District of Pennsylvania and upon pleadings and proof the court found the "Gulftrade" and those in charge of her navigation wholly at fault. An interlocutory decree was entered in favor of the petitioner against the respondents, Independent Pier Company and the Steamship "Gulftrade."

From this decree appeals were taken to the Circuit Court of Appeals for the Third Circuit on behalf of both respondents. That court held the "Taurus" and the "Gulftrade" both at fault and directed that the decree below be modified accordingly. A petition

for rehearing filed by your petitioner was refused by an order filed August 19, 1927.

Following this order the present petition was filed praying for a writ of certiorari.

THE QUESTIONS OF LAW.

I. Does the assent of an overtaken vessel to the passing signal of an overtaking vessel place a burden on the former to keep out of the way of the latter; and to share with her the responsibility of a safe passage; or

II. Does it constitute no more than an assent to the passing at the risk of the overtaking vessel, which is to be her own judge of the matter of safety in passing and assumes all risks except such as may be the fault of the overtaken vessel in failure to maintain her course and speed.

THE ARGUMENT.

In considering the decision of the Circuit Court of Appeals, and the questions of law raised in the petition for writ of certiorari, a brief examination of the facts in somewhat more detail than given above is necessary in order to appreciate the ruling being questioned.

The "TAURUS" was a small river tug about sixty-five feet in length. She was towing four lighters with heavy cargoes. The lighters were at the end of a hawser about one hundred feet long, but they themselves were bunched in two tiers, only a few feet separating the forward tier from the after tier. The length of

the tow itself from the bow of the forward lighters to the stern of the after lighters was two hundred and twenty-five to two hundred and fifty feet. The lighters were square-ended, and had no rudders, and their combined breadth from the starboard side of a lighter on the starboard side of the tow to the port side of a lighter on the port side of the tow was approximately fifty-six feet. They drew eight to ten feet of water, and as has been indicated, were heavily laden.

The tow thus made up proceeded up the Delaware River and rounded into the mouth of the Schuylkill River. The "GULFTRADE" with the tugs "TRITON" and "CHURCHMAN" alongside followed the tow. The tow was moving and could only move and maneuver very slowly. The steamship "GULFTRADE" was proceeding slowly, some of the witnesses say about three miles an hour, yet she overtook the "TAURUS" and its tow in a comparatively short time. As the Master of one of the tugs, who was in charge of the navigation of the "GULFTRADE," testified the "TAURUS" "was going a little bit faster than the tide" (Rec., p. 386). This was the maximum speed and power of which the "TAURUS" was capable under the circumstances, for the testimony is uncontradicted that the "TAURUS" was proceeding up the Delaware and into the Schuylkill at all times under full speed. That the tow was cumbersome, slow moving, difficult to handle and impossible to maneuver quickly should at all times be borne in mind in a consideration of the case.

On the other hand the "GULFTRADE," while laden, could be maneuvered more quickly, and could be handled with greater effectiveness than could the tow. The "GULFTRADE" was proceeding under her own power at slow speed. She had steerage way. Moreover, she had lashed alongside two powerful tugs for the very purpose of handling her whenever circum-

stances made it necessary. In comparison with the "TAURUS" and her tow, she could thus easily change her course, check her headway, or stop, and the presence of the tugs alongside practically insured her against becoming unmanageable and grounding, or meeting with other disaster during the course of such a maneuver.

As the "GULFTRADE" began to overhaul the "TAURUS" passing signals of one blast of the whistle were exchanged between it and the tug, there being a conflict in the testimony as to the exact number, some witnesses saying three separate passing signals were exchanged, and others two. After the "TAURUS" entered the Schuylkill River, her helm was put to starboard and she bore off to port in order to give the "GULFTRADE" ample room to pass, but meanwhile, the flood tide, flowing up the Delaware and into the Schuylkill, acting upon the lighters, swung them out toward mid-channel. The master of the tug thereupon threw his helm to port for a moment to straighten out his tow, but meanwhile the "GULFTRADE," proceeding on her course and entering the Schuylkill River under a starboard helm, swung toward the lighters and ran down the flotilla.

There were no factors of wind or weather contributing to the collision or hampering the vessels involved. The collision occurred about three o'clock P. M. on the first day of October. The weather was fair, the wind negligible and the ordinary flood tide running. The vessels were in sight of each other for a considerable period of time and each knew what the other intended to do. Yet, under these circumstances, the overtaking vessel ran down a cumbersome tow, causing loss of property and loss of life.

The sole defense raised on the pleadings and at the trial and upon the argument before the Circuit Court of Appeals on the part of the "GULFTRADE" is

that immediately preceding the collision the "TAURUS," heavily burdened as she was, failed to maintain her course and speed, but sheered to the starboard so that the lighters in her tow, in the course of a few moments when the flotillas were but a short distance apart, were carried to starboard and across the course of the "GULFTRADE."

Both the District Court and the Circuit Court of Appeals found against the "GULFTRADE" on this issue, the explanation of the collision being found in the opinion of the Circuit Court of Appeals in the following language:

> "When her bow (referring to the 'GULFTRADE') at the slow rate of speed she was going was turned into the dead water of the Schuylkill, her stern was naturally swinging further and further up the Delaware so that she had to round up also from her position, and meanwhile her stern being carried up the Delaware, her bow naturally tended over to the western bank of the Schuylkill and headed in that direction while she was being straightened out."

While this was the natural movement on the part of the "GULFTRADE," it was something which the "TAURUS" was not bound to anticipate as causing a condition dangerous to a passage. It was wholly in the control of the "GULFTRADE." It will be remembered that she had two powerful tugs accompanying her, lashed to her port side, one at the bow and one at the stern, and those tugs could have been maneuvered, as indeed they were immediately prior to the collision, to hold her bow off to starboard and her stern to port as she entered the Schuylkill, and to prevent her swinging so that she would collide with the scows in tow of the "TAURUS." It was clearly no part of the duty of

the "TAURUS" to anticipate that the "GULFTRADE" with two tugs alongside of her would not control her movements and thus convert a situation safe for passage, into an unsafe one by her own maneuvers. That was wholly the duty of the "GULFTRADE." The risk of the maneuver was upon her, and it was the duty of the "TAURUS" only to maintain her course and speed, or to give way to port, which she in fact did, and which it has been found that she did by both Courts having this matter under consideration.

In the face of the above finding, however, and of the issues raised, the Circuit Court of Appeals found that the "TAURUS" was partly at fault for the collision in assenting to the passing signals of the "GULFTRADE." The following language from the decision of the Circuit Court of Appeals gives the ground for its decision: 76 C.C.A. 581

> "When the whistle of the 'GULFTRADE' blew, the 'TAURUS' certainly was not in a position to let the 'GULFTRADE' pass in safety, but she, nevertheless, agreed that the 'GULFTRADE' come ahead. Later on the 'GULFTRADE' evidently became anxious and blew another blast, to which the 'TAURUS' gave the same consent to go ahead, and while there is some question as to whether the 'GULFTRADE' blew a third blast and got the same consent, we are inclined to think she did. Now it seems to us that under the circumstances, the 'TAURUS' was in fault in giving these three consents to the 'GULFTRADE' to come ahead, relying too much on her ability to get out of the channel."

It should here be noted that in the answer to the libel there is no allegation of fault on the part of the "TAURUS" in assenting to the passage. There is no allegation that the vessels were not in position to pass each other in safety, and there is no allegation that at the point of the collision there was not room for them to pass each other in safety.

That the finding of the Circuit Court of Appeals in view of the facts before the Court is in error and is in conflict with the decisions in other circuits appears from an examination of the authorities grouped under the several points following:

Point I. It was the duty of the "GULFTRADE," the overtaking vessel to keep out of the way of the "TAURUS" and its tow, the overtaken vessels, and the assent by the "TAURUS" to the passing signal of the "GULFTRADE" constituted no more than an acknowledgment of the purpose of the "GULFTRADE" and an assent to the passage at the risk of the overtaking vessel.

The situation before the Court of one vessel overtaking and attempting to pass another is governed by the provisions of the rules of navigation contained in the *Inland Rules* and *the Pilot Rules for Inland Waters.*

The Inland Rules provide:

"*Rule VIII.* When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern at-

tempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing

"*Rule IX. Art. 23.* Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Art. 24. Notwithstanding anything contained in these rules, every vessel overtaking any other, shall keep out of the way of the overtaken vessel."

The provisions of the *Pilot Rules* (Rule VI) are substantially the same.

The above rules, and the relative duties of vessels under the circumstances, have been the subject of many decisions, and the law with reference thereto can be summarized briefly, as follows:

It is the duty of an overtaking vessel to keep out of the way of and not crowd the overtaken vessel, and the burden is upon the overtaking vessel to show not only prudence on her part, but negligence on the part of the overtaken vessel. With respect to the exchange of whistle signals, assent by an overtaken vessel to the passing signal of an overtaking vessel is no more than an assent to the passing at the risk of the vessel proposing it, and merely expresses an understanding by the overtaken vessel of what the overtaking vessel desires to do.

In *Spencer Marine Collisions,* Sec. 69, pp. 172-173, the law is stated as follows:

"Where two vessels are running in the same direction, one astern of the other, the law imposes upon the one following the obligation of exercising

a greater degree of care to avoid collision than is imposed upon the other; the statute requiring every vessel, whether steamship or sailing vessel, when overtaking another, to keep out of the way of the one overtaken.

"The duty of an overtaking vessel to keep out of the way is especially imperative when it is a steamer, as it has control over its motive power, and can promptly and accurately govern her own movements. The duty of avoiding the leading ship being imposed by law upon the one following, in case of collision the burden of proof is cast upon the latter to show the prudence of her own conduct, the negligence of the one leading, and that the collision was not caused by fault on her own part. * * *

"Under the rules no subsequent alteration of the position of the vessels can make the one following other than an overtaking vessel, or relieve her from the duty of keeping clear of the leading ship until fully past and clear; and it is her duty to take such reasonable precautions as may be necessary to avoid the other, the burden of proof being upon her to show that such precautions were timely and sufficient. While the leading vessel has the right of way, she may not wilfully cross the path of the other without forfeiting all right of recovery for collision ensuing therefrom, even though the overtaking vessel be not wholly without fault."

In other words the only duty on the "TAURUS" after the exchange of passing signals was to maintain her course and speed and she was not at fault in assenting to the passage by the "GULFTRADE" unless it was unsafe for the "GULFTRADE" to attempt to pass at that point *because of some danger apparent to her and not to the* "GULFTRADE," *such as a necessary change in her course or some condition known to herself and not to the overtaking vessel.*

Of this there is no intimation in the record. It has long been settled, that the overtaking vessel assumes

the risk of determining when and where a safe passage can be made after due consideration of all the factors entering into the situation. As was said by Judge Betts in the *Steamer "Rhode Island,"* Olcott 505: Fed. Cas. 11,745:

> "The approaching vessel when she has command of her movement, takes upon herself the peril of determining whether a safe passage remains for her beside the one preceding her and must bear the consequences of misjudgment in that respect."

This decision of Judge Betts' in the "Rhode Island" was referred to with approval by the Supreme Court of the United States in *Whitridge, et al. v. Dill, et al.*, 23 How. 448.

The duty of an overtaking vessel has been stated and restated many times, and it has always been recognized and held by the Courts, that the duty is upon her to keep out of the way of the overtaken vessel. As was said by Circuit Judge Waddell in the *"City of Baltimore,"* 282 Fed. 490, C. C. A. 4th Cir. (1922), at page 492:

> "She was an overtaking vessel, charged specifically with the duty of securing the assent of the other vessel before attempting to pass, and at the same time with the duty of keeping clear and out of the way of the overtaken vessel. Rules of Navigation, article 18, rule 8 (Comp. St. Sec. 7892); also articles 21, 22, 23 and 24 (Sections 7895-7898), The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Sif (D. C.), 181 Fed. 412; Atlas Transportation Co. v. Lee Line Steamers, 235 Fed. 492, 149 C. C. A. 38; The Samarinda, 244 Fed. 744, 157 C. C. A. 192; The Hampden (C. C. A.), 276 Fed. 399."

In view of the facts before it, the Circuit Court of Appeals in its decision has enlarged the obligations

of an overtaken vessel as stated in the rules and in the above decisions, and has increased that burden to an extent not justified by any decisions known to the petitioner. In effect it placed upon the "TAURUS" the burden of observing the navigation of the "GULFTRADE," of anticipating her movements in swinging into the Schuylkill and her failure to be able to straighten out on her course in time to avoid collision with the tow. It also follows that the decision placed upon the "TAURUS" an obligation to know the draft of the "GULFTRADE," her breadth of beam, and to conclude from this that because of her position in the channel and the depth of the deep water channel that it was unsafe for the "GULFTRADE" to round the "TAURUS" and her tows at that particular point, and therefore placed an obligation upon her to dissent from the passing signal blown by the "GULFTRADE."

In imposing this duty and obligation upon the "TAURUS" it is respectfully submitted that the finding of the Court places upon the overtaken vessel a responsibility which under the rules is not hers, and which is not only in conflict with the principles above stated, but in direct conflict with an analogous decision in the Eighth Circuit.

Point II—The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Atlas Transport Company v. Lee Line Steamers,* 235 Fed. 492 C. C. A. 8th Cir. (1916).

The situation presented in the present case is most nearly paralleled in *Atlas Transportation Co. v. Lee Line Steamers,* 235 Fed. 492 C. C. A. 8th Cir. (1916). In that case the steamship "Rees Lee" attempted to pass the steam tug "Josh Cook" with four

barges in tow, and collided with the barges. The passing signals had been exchanged between the "Rees Lee" and the "Josh Cook," and as to the effect of these signals and the effect of the assent of the "Josh Cook" to the passing signal of the "Rees Lee," the Court said, page 495:

> "The Rees Lee had the right to pass the other boat if it could do so with safety to both. It had to be its own judge as to the matter of safety, as whatever risk attended its passage from the narrowness of channel, the shallowness of water, the current, suction, or other causes, except the fault of the Josh Cook, was assumed by the Rees Lee. *The reply of the Josh Cook to the passing signal of the Rees Lee was no more than an assent to it, at the risk of the vessel proposing it. It expressed an understanding of what the Rees Lee proposed, to do, and an agreement not to thwart it; but the success of the maneuver was at the risk of the Rees Lee.*" (Italics ours.)

The owners of the "Rees Lee," the overtaking vessel in that case, filed a petition for rehearing *on the ground that the "Josh Cook" was negligent in whistling its assent for the "Rees Lee" to pass at a dangerous place. Atlas Transport Co. v. Lee Line Steamers,* 238 Fed. 349 (1916). This petition was denied. The Court said:

> "The Josh Cook by its signal of two whistles (the passing signals) did not assent that the Rees Lee could pass recklessly, but only that it could pass safely, if properly navigated. It assented that it could pass at a proper distance and a proper speed. . . . The testimony is convincing that the place was safe for passing, if the Rees Lee had passed slowly."

Proctor for the overtaking vessel filed a petition for writ of certiorari to the Supreme Court, which peti-

tion was refused, *Atlas Transport Co. v. Lee Line Steamers,* 243 U. S. 643.

The effect of this decision, which has been cited with approval a number of times since it was rendered, and which has not been criticised, when applied to the present case, clearly defines the duties and obligations of the "TAURUS" and the effect of its assent to the passing signal of the "GULFTRADE." The assent amounted to this:

That the "TAURUS" knew the "GULFTRADE" would attempt to pass; that the "TAURUS" undertook to maintain its course and speed; and that so far as it could see there was no danger in the passage because of the place chosen therefor.

The "TAURUS" in consequence of its signal, maintained its course and speed and fulfilled all the duties imposed upon it by law, and under the circumstances, it was clearly not at fault for assenting to the passage.

On the other hand, the burden was upon the "GULFTRADE" to pass with care, at a proper place and at a proper distance from the tow. It was the duty of the "GULFTRADE" to determine whether she could pass the "TAURUS" at the particular point chosen. The situation was obvious to those in command of the "GULFTRADE." They knew what she was drawing, what draft she would need, what depth of water was available and the width of the channel. They could see directly ahead of them the "TAURUS," and they could also see that she was going off to port as fast as was possible. There was no danger obvious to the "TAURUS" except that the "GULFTRADE" might run her down, and this she was not bound to foresee. She was only bound to warn the "GULFTRADE" as to dangers not obvious to that vessel. As was said by Circuit Judge Woods *in the Dorset,* 260 Fed. 32, C. C. A. 4th Cir. (1919), in commenting upon the *Atlas Transport Co. v. Lee Line Steamers,* at page 34:

"Atlas Trans. Co. v. Lee Line Steamers, 235 Fed. 492, 149 C. C. A. 38, is relied on as holding the signal of the Crisfield and the assent of the Dorset imposed no obligation on the Dorset but that was an overtaking case where ordinarily *there is no duty on the overtaken vessel except to keep her course unless she perceived danger not obvious to the overtaking vessel.*"

Further comment upon the authorities is unnecessary. The law is clear as to the duties and responsibility of overtaking and overtaken vessels respectively, and it is well established that the burden of passage is not shared equally between the two. The overtaking vessel must keep out of the way. She must pick the place of passage. She must pass at a proper distance. She must observe care in the matter of speed, and an overtaken vessel has no duty or obligation whatsoever, except to maintain her course and speed, or unless she knows of some danger not obvious to the overtaking vessel.

In the present case as far as the "TAURUS" was concerned, it was perfectly safe for the "GULFTRADE" to pass. It was found by both Courts that the "TAURUS" maintained her course and speed, and furthermore gave way to port to give the "GULFTRADE" all the passageway possible. She was not required to do this by the rules, but on the other hand, the rules contemplate that the overtaking vessel shall steer to port or to starboard after receiving an assent to a passing signal in order to keep out of the way of the overtaken vessel. There is no indication in the record that such a change of course was made by the "GULFTRADE," but insofar as the "TAURUS" was concerned there was no reason why the "GULFTRADE" should not pass at such place as was safe having regard to the draft of the "GULFTRADE," the width of the deep water channel and all other factors known to her own navigators

and to be considered in passing at a given point. The "TAURUS" therefore assented to the passage, and it was then the obligation of the "GULFTRADE" if she had room to pass at that point to port her helm to round the "TAURUS." If there was not room enough at that particular point to effect the passage with safety, the obligation was upon the "GULFTRADE" to wait until there was such room or such depth of water. This she failed to do, but there was no obligation upon the "TAURUS" to anticipate such failure.

The decision of the Circuit Court of Appeals, however, imposes that duty upon the overtaken vessel and places upon it too great a burden, going far in the direction of making both the overtaking and overtaken vessel assume an equal share of the responsibility for a safe passage. In so holding, the decision seems at variance with the well-established rules on the subject and for that reason, and so that the law may be made uniform and that justice be done the petitioner, it is submitted that a writ of certiorari should issue in order that the record in the case be brought before this Court for review, and final determination.

Respectfully submitted,

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